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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 705

PIEDMONT FIRE INSURANCE COMPANY,
PETITIONER,

versus

HARRY J. AARON, MRS. D. E. ROLES, MRS. WALTER ROOKS, ET AL., RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

PIEDMONT FIRE INSURANCE COMPANY,
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SUBJECT INDEX

	Page
PETITION FOR A WRIT OF *CERTIORARI*	1
STATEMENT OF THE CASE	2
OPINION BELOW	2
JURISDICTION	3
QUESTIONS PRESENTED	3
THE PLEADINGS	6
Civil Action 9	6
Civil Action No. 16	8
REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT	9
CONCLUSION	13
APPENDIX TO PETITION FOR *CERTIORARI*	15
BRIEF IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*	17
THE OPINION OF THE COURT BELOW	17
STATEMENT OF THE CASE	18
SPECIFICATIONS OF ERROR	20
ARGUMENT	22
THE OPINION AND ORDER OF THE DISTRICT COURT	24
THE OPINION OF THE CIRCUIT COURT OF APPEALS	26
COMMENT	27
Similar Policy Construed by Federal Court in Louisiana	30
CONCLUSION	32

TABLE OF CASES.

Page

Aetna Ins. Co. of Hartford, Conn., v. *Haworth, et al.*, 300 U. S. 227 . . . . . 9, 20, 22

American Auto Ins. Co. v. *Freundt*, 103 Fed. (2d) 613. 10

American Life Ins. Co. v. *Stewart*, 300 U. S. 203-216 . . . . . 12, 20, 23

Altwater v. *Freeman*, 219 U. S. . . . ., 87 L. Ed. 1035. . 9

Boyd v. *McKee*, 99 Va. 72. 31

Brillhart v. *Excess Ins. Co.*, 316 U. S. 491-502. . 10, 20, 22

Brown, et al., v. *Pacific Life Insurance Co.*, 62 Fed. (2d) 711 23

California v. *San Pablo, etc., R. Co.*, 149 U. S. 308. . 11

Carpenter, et al., v. *Edmondson*, 92 Fed. (2d) 895. . 9, 21

Central Security Ins. Corp. v. *Caswell, et al.*, 91 Fed. (2d) 607 9

Central States Grain Co-Op. v. *Nashville Warehouse and Elev. Co.*, 48 Fed. (2d) 138. . . . . 13, 31

Century Ins. Co., Ltd., v. *First Natl. Bank of Hugh Springs, Texas*, 102 Fed. (2d) 138. . . . . 13, 31

Columbian Nat. Life Ins. Co. v. *Foulke*, 89 Fed. (2d) 261 9

Crosley Corp. v. *Hazeltine Corp.*, 122 Fed. (2d) 925. . 9, 21

Dakota Co. v. *Glidden*, 113 U. S. 262. 11

Dominion Electric Manfg. Co. v. *Edwin L. Wiegand Co.*, 126 Fed. (2d) 172 9

Eames v. *Home Ins. Co.*, 94 U. S. 621. 23

Employers Liability Assur. Corp., Ltd., v. *Ryan, et al.*, 109 Fed. (2d) 690 . . . . . 9, 24

Franklin F. Ins. Co. v. *Colt*, 20 Wallace 560, 22 L. Ed. 423 23

Gulley v. *Interstate Nat. Gas Co.*, 82 Fed. (2d) 145. . . 9

Haden v. *Farmers & M. Fire Asso.*, 80 Va. 683. 23

Haskins v. *Agricultural F. Ins. Co.*, 78 Va. 700. 23

Page

Home Ins. Co. v. *Baltimore Warehouse Co.*, 93 U. S. 527 31

Home Insurance Co. v. *Virginia-Carolina Chemical Co.*, 113 Fed. 1 23

Interstate F. Ins. Co. v. *McFall*, 114 Va. 207 23

Kimball v. *Kimball*, 174 U. S. 158 11

Leonard v. *Field*, 71 Fed. (2d) 483 12

Maryland Casualty Co. v. *Consumers Finance Service*, 101 Fed. (2d) 514 ..... 9, 20, 23

Maryland Casualty Company v. *United Corpn. of Massachusetts, et al.*, 111 Fed. (2d) 443 9

Mills v. *Green*, 159 U. S. 651 11

Mississippi Power and Light Co. v. *City of Jackson*, 116 Fed. (2d) 924 9

Natl. Liberty, etc., v. *Jones*, 165 Va. 606 ..... 23, 29, 31

National Hairdressers, etc., v. *Philad Co.*, 41 F. Supp. 701 21

Northern Assurance Co. v. *Grand View Building Assn.*, 203 U. S. 106 31

Pacific Fire Ins. Co. v. *Reiner, et al.*, 45 F. Supp. 702 ..... 13, 21, 30

Sanford v. *Orient Insurance Co.*, 174 Mass. 416 31

Tayloe v. *Merchants F. Ins. Co.*, 9 Howard 390, 13 L. Ed. 187 23

Union M. Ins. Co. v. *Commercial M. M. Ins. Co.*, 19 Howard 318, 15 L. Ed. 636 23

United States Fidelity & G. Co. v. *Koch*, 102 Fed. (2d) 288 24

Wooddy v. *Old Dominion Ins. Co.*, 31 Gratt. 362 23

Couch on Insurance, Volume 8, Section 1971 31

Section 74 (d), Judicial Code (U. S. C., Title 28, Section 24) 3

Page

Section 240 (a), Judicial Code (U. S. C., Title 28, Section 347 (a) 3
Judicial Code (3), 28 U. S. C. A., Section 400 (3) 4, 9
Judicial Code, Section 274d (3) 4
Seventh Amendment to Constitution 4, 22
Virginia Statute, Section 5768 .....8, 15
Virginia Statute, Section 6094 .....15, 23, 31

Federal Rules of Civil Procedure:
Rule 16 .....5, 8, 11
Rule 23 .....5, 12, 21
Rule 57 .....4, 10, 24
Rules of Civil Procedure for District Courts of the United States, Rules 17, sub-section (b) 8

IN THE

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No.

PIEDMONT FIRE INSURANCE COMPANY,
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versus

HARRY J. AARON, MRS. D. E. ROLES, MRS. WALTER ROOKS, ET AL., RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

May it Please the Court:

The Piedmont Fire Insurance Company, a corporation, prays that a writ of *certiorari* be issued to review a judgment of the United States Circuit Court of Appeals for the Fourth Circuit entered on the 8th day of November, 1943, in the civil action therein pending on

appeal from the United States District Court for the Eastern District of Virginia dismissing a Declaratory Judgment action instituted by it in the Newport News Division of said Court wherein Harry J. Aaron and Mrs. D. E. Roles, Mrs. Walter Rooks, and other parties similarly situated, numbering approximately nine hundred and thirty-four individuals, were sued as a class together with other defendants mentioned.

The petitioner respectfully shows to this Honorable Court:

A.

STATEMENT OF THE CASE.

I.

The Piedmont Fire Insurance Company is a corporation chartered and organized under the laws of North Carolina and a citizen of said State; Harry J. Aaron, Mrs. D. E. Roles, Mrs. Walter Rooks, and other parties similarly situated, who were made defendants as a class, the appellees herein, are respectively citizens of the State of Virginia.

II.

A certified copy of the entire record of said case in the said Circuit Court of Appeals is furnished and made a part hereof.

III.

OPINION BELOW.

The opinion of the Circuit Court of Appeals (Record 98) 138 Fed. (2) 732.

IV.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on the 8th day of November, 1943 (Record 101), rehearing denied January 10, 1944. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, etc. [U. S. C., Title 28, Section 347(a)]. See also Rules 38, *et seq.* as amended and existing.

V.

QUESTIONS PRESENTED.

(a) Whether a District Court of the United States after such has assumed and taken cognizance of a Declaratory Judgment proceeding instituted therein pursuant to Section 74(d) of the Judicial Code, as amended, U. S. C., Title 28, Section 24, as to the jurisdiction of such under the statute, no question had been raised by any defending litigant, and in which proceeding, answers had been filed going to the merits of the issues presented, the case pending upon the docket therein for eight (8) months during which time the litigants having been subjected to costs and delay incidently incurred and sustained exceeds its judicial discretion in dismissing such proceeding upon its own motion, over the objection of the plaintiff where there has been no hearing upon the merits of the case and the introduction of no new facts or circumstances tending to show that the complaint as originally filed did not present a case cognizable under the Declaratory Judgment Act.

(b) Whether it is not an abuse of discretion in a District Court to dismiss on its own motion a Declaratory Judgment suit brought under the Declaratory

Judgment Act [Jud. Code (3), 28 U. S. C. A., Section 400 (3)], or to give precedence in the hearing of such case, as provided under Rule 57 (Federal Rules of Civil Procedure) to a common law suit then upon the docket of such court originally brought by one of the defendants in a State Court against the plaintiff in the former action alone, which had been removed to the District Court by the plaintiff in the Declaratory Judgment proceeding upon the grounds of diversity of citizenship and there docketed, subsequent to the institution of the former suit, when there is nothing shown in the state of the pleadings or otherwise at the time of such dismissal that the rights of all litigants in both actions may not be fully protected under the pleadings in the Declaratory Judgment case.

(c) Whether a motion to dismiss a request for trial by jury in a Declaratory Judgment action brought under Section 274d (3) of the Judicial Code should not be sustained by the District Court where the issues presented in such, as disclosed by the pleadings, or otherwise shown, are solely equitable in their nature, i. e., such issues as were cognizable alone in a court of equity when the Seventh Amendment to the Constitution of the United States, providing for the right of trial by jury in certain suits at common law, was adopted?

(d) Whether it is permissible for a Circuit Court of Appeals, when considering on appeal the action of a District Court in dismissing a Declaratory Judgment action, to accept, consider and act upon certain alleged statements, not found in the record as certified from the District Court, brought to the attention of the appellate court through the means of an *ex parte* affidavit made by one of the parties to the cause and filed in the appellate court, or on the statement of counsel in a brief filed on behalf of such litigant, that the District Court had in arriving at its decision on the question involved in the

appeal, been influenced by a "factual situation" presented at a pre-trial hearing before such District Judge, when the record, as certified from the District Court, does not show that any pre-trial conference was held in such Court and the fact as to such having been held is not admitted but denied by opposing counsel in the Circuit Court of Appeals.

(e) Whether it is not obligatory under Rule 16 (F. R. C. P.), providing for procedure in pre-trial hearings, to preserve through an order of Court duly entered, or a stipulation of counsel taken at the time and made a part of the record, the actions taken before the Judge at such conference, and in the absence of such record being shown in the record of proceedings in the District Court as certified to such Circuit Court of Appeals, can the appellate Court accept and consider as facts so alleged to have been brought to the attention of the trial judge at an alleged pre-trial conference not so shown by the record to have been held.

(f) Whether, where in a Declaratory Judgment action instituted in a District Court by an insurance company seeking a declaration by the Court of its obligations under a binder issued by it under an insurance policy in which a large class of persons are severally interested as the beneficiaries thereunder, and such persons constituting a class so numerous as to make it impracticable for the plaintiff in such action to bring them all before the Court, and such are made parties defendant as a class in the manner provided by Rule 23 (F. R. C. P.), a District Court may enter an order dismissing such Declaratory Judgment suit, or such an order as effects a compromise of the rights of any of the litigants thereunder sued as a class without the consent of all parties to the cause or except in the manner provided under Rule 23 of Federal Rules of Civil Procedure.

VI.

THE PLEADINGS.

Civil Action No. 9.

The suit in which the decision sought to be reviewed was rendered was a consolidated cause pending in the District Court of the United States for the Eastern District of Virginia, Newport News Division, and therein designated as Civil Action No. 9 and Civil Action No. 16, the former, a Declaratory Judgment action instituted in the District Court on the 12th day of September, 1942, by the appellant against Harry J. Aaron and various other parties, including the appellees Mrs. D. E. Roles, Mrs. Walter Rooks and others, 934 persons in number, who were made defendants therein as a class, thirty-four (34) of whom being therein named upon whom process was served.

The object of the plaintiff being, as alleged in its petition, to secure a declaration by the Court of its rights, relations and legal liability, if any, to all parties interested in or entitled to benefits under the terms of a Furriers' Customers Insurance Policy, a binder securing the delivery of such having been issued by the appellant on June 15, 1942, upon the request of the appellee, Aaron, who had a dry goods store and merchant's business at Newport News, Virginia, and to whom the appellant had issued such binder upon the written request of an insurance broker and insurance agent on the day mentioned. Under the pleadings it is conceded that this broker was the agent of Aaron and that the insurance was applied for in a letter of the date mentioned to a local agent of the appellant at Newport News, Virginia, in which the binder was requested to be supplied by return mail. According to the allegations in the complaint, the binder had been procured through fraud, misrepresentation and concealment as to which both the appellee, Aaron, and his agent were cognizant, the details of which fraud and the circumstances which arose

in connection with the issuance of the binder are duly set out in the original complaint (Record 2).

It is averred in the complaint, and not denied in any defensive pleadings, that a fire of undisclosed origin occurred within three days of the placing of the insurance and that Aaron had in his store building at the time, held by him as bailee for hire, fur garments belonging to some nine hundred and more customers, to whom he had furnished warehouse or storage receipts, which garments had been injured or destroyed in the fire. Under the allegations in the petition and accompanying exhibits it is shown and claimed that each of the persons, made defendants as a class, hereinbefore mentioned, was or would be entitled to personal and individual protection under the terms of the Furriers' Customers Policy involved, and *furthermore that no property of the appellee, Aaron, was insured under the policy.* It is also averred under information and belief in the petition that there were other binders issued by other companies on the risk involved at the date of the fire. The petition carried the usual prayer for the granting of a Declaratory Judgment.

Answers to this petition were filed by sundry parties, including the appellee, Aaron, and the appellees, Mrs. D. E. Roles, Mrs. Walter Rooks, answering for themselves and others similarly situated as a class (Record 43).

The appellee, Aaron, filed a full and complete answer in the declaratory action. This answer was filed in the District Court on October 3, 1942 (Record 32), and before this defendant had even filed his initial pleading, the declaration in his common law action, *infra*, in the State Court, i. e., First October Rules (Record 7).

The answer denies fraud on the part of himself and his agent when seeking the binder for the insurance (Record 36). It admits that the Furriers' Customers Policy (Exhibit E) filed with plaintiff's petition in the

Declaratory Judgment action (Record 25) is the form of policy sought and that such "should now be issued", but he denies that his customers, the holders of his storage receipts, are interested in such policy, nor are such necessary or proper parties to the suit; that he has a valid and subsisting claim against the plaintiff therein, and avers that if the Court take jurisdiction of the cause, that he "may have" a jury trial on the issues involved.

Civil Action No. 16.

The second of the suits above mentioned was the common law action instituted in the State Court by the appellee, Aaron, in and for himself against the appellant on September 11th, 1942, when a memorandum was then filed returnable to the Third September Rules, under the State practice. The declaration was shown filed at the First October Rules (October 5th-8th, 1942), (Record 53). The cause matured upon the docket of the Court on October 19th, 1942, when it was, on that day, ordered to be removed to the United States District Court (Record 54).

The source and form of the declaration (Record 50) is of importance as it was this pleading which the District Court retained upon its docket as a master pleading to dispose of the litigation involved (Record 86).

The Court makes no provision under its order for the protection of those litigants who had been brought into court as a class under Rule 16 in the Declaratory Judgment proceeding, nor for the protection of the plaintiff as to such parties who hold an immediate right to sue such plaintiff under the insurance contract involved, and entitled so to do individually both under Rules of Civil Procedure for the District Courts of the United States, Rule 17, sub-section (b), and under the Virginia Statute, Section 5768 (See Appendix).

B.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

(1) In sustaining the ruling (Record 86) of the District Court in dismissing on its own motion the Declaratory Judgment proceeding brought under the Declaratory Judgment Act [Jud. Code (3), 28 U. S. C. A., Section 400 (3)] after such had once taken jurisdiction thereof, and in which the pleadings stated facts adequate and sufficient to give the Court under the provisions of the Act complete jurisdiction, both as to the subject matter involved and the parties thereto, the Circuit Court of Appeals committed error, and has decided a Federal question of prime importance affecting the usefulness of the Declaratory Judgment Act as a remedial form of procedure, contrary to the decisions of this Court, *viz*: *Aetna Ins. Co. of Hartford, Conn.* v. *Haworth, et al.*, 300 U. S. 227; *Altwater* v. *Freeman*, 219 U. S. ...., 87 L. Ed. 1035; and has rendered a decision in conflict with decisions of other Circuit Courts of Appeals on the same matter, *viz*: *Central Security Ins. Corp.* v. *Caswell, et al.* (5 C. C. A. 1937), 91 Fed. (2d) 607; *Gulley* v. *Interstate Nat. Gas Co.* (5 C. C. A. 1935), 82 Fed. (2d) 145; *Crosley Corp* v. *Hazeltine Corp.* (3 C. C. A. 1941), 122 Fed. (2d) 925 (*certiorari* denied, 315 U. S. 812). *Maryland Casualty Company* v. *United Corpn. of Massachusetts, et al.* (1 C. C. A. 1940), 111 Fed. (2d) 443; *Employers Liability Assur. Corp. Ltd.* v. *Ryan, et al.* (6 C. C. A. 1940), 109 Fed. (2d) 690; *Mississippi Power and Light Co.* v. *City of Jackson* (5 C. C. A. 1941), 116 Fed. (2d) 924; *Dominion Electric Manufacturing Co.* v. *Edwin L. Wiegand Co.* (6 C. C. A. 1942), 126 Fed. (2d) 172; *Carpenter, et al.* v. *Edmonson* (5 C. C. A. 1937), 92 Fed. (2d) 895; *Columbian Nat. Life Ins. Co.* v. *Foulke* (8 C. C. A. 1937), 89 Fed. (2d) 261; *Maryland Casualty Co.* v. *Consumers Finance Service* (3 C.

C. A. 1938), 101 Fed. (2d) 514; *American Auto Ins. Co.* v. *Freundt* (7. C. C. A. 1939), 103 Fed. (2) 613.

Furthermore such ruling is in conflict with the Federal Rules of Civil Procedure, *viz*: Rule 57.

(2) In sustaining the ruling of the District Court (Record 86) that such Court may take and assume jurisdiction in a declaratory judgment proceeding originating under the Declaratory Judgment Act [Jud. Code (3), 28 U. S. C. A., Section 400 (3)] in which there are many parties defendant, continue the same upon its docket for eight (8) months, during which period of time permitting numerous pleas to be filed directed to the merits of the case, order a consolidation of such action with a Civil Action at the time on the docket of such District Court, which had been removed from a State Court and placed upon the docket subsequent to the institution therein of the declaratory judgment proceeding, when the District Court of its own motion, and without adequate cause assigned, dismisses such declaratory judgment proceeding leaving the plaintiff in the declaratory judgment suit to seek such protection in the common law action mentioned as it may be permitted to make as a defendant therein in lieu of affording such plaintiff the relief as originally prayed in the former proceeding, the Circuit Court of Appeals in this instance has recognized and established a precedent in Federal practice detrimental to the interests of litigants in the Federal Court; and one which is contrary to the ruling of this Honorable Court in *Brillhart* v. *Excess Ins. Co.*, 316 U. S. 491-502.

(3) That the action of the Circuit Court of Appeals in accepting and adopting as a basis for its ruling in sustaining the action of the District Court in dismissing the declaratory judgment proceeding in this case (Record 86) certain alleged facts, alleged to have been

introduced in the District Court at a pre-trial hearing which were brought to the attention of the Circuit Court of Appeals in an *ex parte* affidavit made by one of the appellees and filed therein after the pending case had been therein docketed, and after the filing of the opening brief of counsel for the appellant; in which affidavit the attention of the Court is directed to alleged facts and circumstances which were not included directly or found through inference in the record as certified from the District Court, to the effect that the District Court when entering the order under review had had the facts in the affidavit related, namely, that settlements had been previously made with sundry parties defendant in the proceeding, and that this information, furnished at a pre-trial hearing, had influenced the District Judge in rendering the decision presented in the appeal and order, then under consideration by the Circuit Court of Appeals, while the record as certified from the District Court disclosed that no such pre-trial conference as alleged, as provided under Rule 16 (F. R. C. P.), was had in the District Court, it is here insisted that such course of procedure so adopted and followed by the Circuit Court of Appeals in this instance, in admitting and considering evidence so introduced, is contrary to the rule of practice prevailing generally in appellate courts, is contrary to the rule of practice prevailing in the Federal Courts, including this Honorable Court, except in the rare instances where the evidence so submitted, not included in the certified record, is directed to the jurisdiction of the Court to proceed in the matter before it on appeal. The ruling of the Circuit Court of Appeals in this instance goes further and appears to be in conflict with the *limitations* recognized in the following cases: *Kimball* v. *Kimball*, 174 U. S. 158, 43 L. Ed. 932; *California* v. *San Pablo, etc., R. Co.*, 149 U. S. 308, 37 L. Ed. 747; *Mills* v. *Green*, 159 U. S. 651, 40 L. Ed. 293; and *Dakota Co.* v. *Glidden*, 113 U. S. 262, 28 L. Ed. 981.

And such ruling is contrary to practice adopted and followed in other judicial circuits, namely, in the Ninth Judicial Circuit (see *Leonard* v. *Field*, 9 C. C. A., 71 Fed. (2d) 483.)

Moreover, such ruling is unfair to the litigant and contrary to public policy as exemplified in the present case.

(4) The action of the District Court, approved by the Circuit Court of Appeals, in dismissing the Declaratory Judgment action, taking as it did defendants thereto who were not parties to the cause retained upon its docket, was irregular from a procedural standpoint and unfair to the litigants concerned, as both the plaintiff and those defendants in such action who were then before the Court, having been made defendants under Rule 23 (F. R. C. P.), were entitled to an adjudication of their rights in the matter in controversy. The Court should have at least retained the cause upon its docket until both causes which had been consolidated by its order had been finally disposed of. *American Life Ins. Co.* v. *Stewart*, 300 U. S. 203-216, 81 L. Ed. 605.

(5) The action of the District Court (Record 86) approved by the Circuit Court of Appeals (Record 101) in dismissing the Declaratory Judgment proceeding then pending without taking cognizance of, and protecting under its decision the rights of the plaintiff and those defendants who were sued as a class under Rule 23, was clearly erroneous, and in conflict with the ruling of other Federal Courts of high standing. The Court could not under any recognized form of practice dismiss indirectly a group of litigants properly brought before it, through the dismissal of the suit in which they had been implicated; certainly both the rights of these litigants and the plaintiff in respect to such assumption of such rights should have been protected by the Court under the provisions of Rule 23 (R. F. C. P.), and such ac-

tion of the Circuit Court in so approving the action of the District Court in the premises is contrary to the ruling prevailing in other Federal Judicial Circuits, namely, the Fifth and Seventh, as exemplified in the following cases: *Century Ins. Co., Ltd.* v. *First Natl. Bank of Hugh Springs, Texas* (5 C. C. A. 1939), 102 Fed. (2d) 138; *Central States Grain Co-Op.* v. *Nashville Warehouse and Elevator Corp.* (7 C. C. A. 1931), 48 Fed. (2d) 138; and *Pacific Fire Ins. Co.* v. *Reiner, et al.*, 45 F. Supp. 702.

CONCLUSION.

Each of the questions presented is of grave importance. The very integrity of the jurisdiction of the Federal Courts is involved in the reasonable and fair application and interpretation by the Federal Courts of the present Rules of Civil Procedure, and particularly where the rules concern the administration in those courts where an election of forum may be had by the litigants between such courts and the State Court, and in cases where the issues presented between the age-old conflict between the Common Law and Equity Court are involved.

Moreover, there seems to be a conflict in the attitude of the courts in different Federal Judicial Circuits respecting the scope, or usefulness, of the Declaratory Judgment proceeding as reflected both in respect to the court assuming jurisdiction of such, and in the administration of the procedure involved where jurisdiction is

As to the questions here presented in the action of the Circuit Court of Appeals both in approving the action of the District Court in each of the several matters presented, and also in accepting and acting upon alleged facts not found in the record, it would seem particularly desirable that there should be a review of such questions of fundamental importance, in the public in

terest and that such questions be determined by this Honorable Court.

Wherefore, your petitioner prays that a writ of *certiorari* issue under the seal of this court, directed to the United States Circuit Court of Appeals for the Fourth Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of said United States Circuit Court of Appeals in the case numbered and entitled on its docket No. 5108, civil, *Piedmont Fire Insurance Company, appellant,* v. *Harry J. Aaron, Mrs. D. E. Roles, Mrs. Walter Rooks, et al., appellees,* to the end that this cause may be reviewed and determined by this court as provided for by the statutes of the United States, and that the judgment of said Circuit Court of Appeals be reversed by this court, and your petitioner prays that the certified copy of the record and proceedings of said United States Circuit Court of Appeals for the Fourth Circuit, filed with this petition, may be treated as a return to said writ of *certiorari,* and your petitioner prays that it may have such other and further remedies in the premises as to the court may seem appropriate and in conformity with law.

PIEDMONT FIRE INSURANCE COMPANY,
By ALEXANDER H. SANDS,
Richmond, Virginia,
CHARLES E. FORD,
Newport News, Virginia,
Counsel for Petitioner.

APPENDIX TO PETITION FOR CERTIORARI.

VIRGINIA CODE OF 1942.

§5768. *Assignees, etc., may sue in their own names; what discounts allowed.*—The assignee or beneficial owner of any bond, note, writing or other chose in action, not negotiable, may maintain thereon in his own name any action which the original obligee, payee, or contracting party might have brought, but shall allow all just discounts, not only against himself, but against such obligee, payee, or contracting party, before the defendant had notice of the assignment or transfer by such obligee, payee, or contracting party, and shall also allow all such discounts against any intermediate assignor or transferrer, the right to which was acquired on the faith of the assignment or transfer to him and before the defendant had notice of the assignment or transfer by such assignor or transferrer to another. (Code 1887, §2860.)

* * * * *

§6094. *Declaration on policy of insurance.*—In an action on a policy of insurance no particular form of action or declaration shall be necessary, but it shall be sufficient for the plaintiff to file a complaint in writing at common law, setting forth the grounds of his action, and the relief prayed for, and filing therewith the original policy, or a sworn copy thereof, upon which his action is brought, and the loss or death relied upon as the ground of his recovery, and that he has performed all the conditions of said policy, and violated none of its prohibitions, and in such complaint it shall not be necessary to set forth every condition or proviso of said policy nor to aver observance of or compliance therewith *seriatum*, but a general averment to that effect shall suffice. Such complaint shall be filed in the same court and at the same time at which a declaration in such cases is now required by law, and such action shall be matured in the same manner as at present. (Code 1887, §3251; 1895-6, p. 707.)

IN THE

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PIEDMONT FIRE INSURANCE COMPANY,
PETITIONER,

versus

HARRY J. AARON, MRS. D. E. ROLES, MRS. WALTER ROOKS, ET AL., RESPONDENTS.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINION OF THE COURT BELOW.

The opinion of the Circuit Court of Appeals of the Fourth Circuit to be reviewed carrying the above caption was rendered in a civil cause on November 8th, 1943, on which a rehearing was denied January 10th, 1944.

II.

STATEMENT OF THE CASE.

The petition filed herewith brings to the attention of the Court for review the action of the Circuit Court of Appeals for the Fourth Circuit both in affirming certain rulings of the District Court contrary to the position taken thereon by the appellant and dismissing on its own motion a Declaratory Judgment proceeding instituted by the appellant against the appellees and others in this cause; and also the action of the Circuit Court of Appeals in considering and acting upon certain testimony, or findings of fact, not certified from the District Court but brought to its attention through means of affidavit and statements of counsel submitted at the hearing or through briefs filed in the appellate court (Record 98).

From an examination of the record filed with the petition for *certiorari* in this Court it will appear that the appellant, the Piedmont Fire Insurance Company, through its local agent at Newport News, Virginia, on June 15, 1942, issued through the request of the appellee, Aaron, made by his agent and broker, a written binder for a Furriers' Customers Insurance Policy (Record 3), the purpose of the binder being to protect those concerned pending the issuance by the appellant of its formal policy which was to be delivered in the usual course and in at least thirty (30) days from the date of the binder. On June 18th following the property consisting of fur garments belonging to sundry customers of Aaron (estimated in the pleadings in the case as numbering from 934 to 976) then held in storage by him in his store, vault or warehouse at Newport News, Virginia, was injured or destroyed as a consequence of a fire there occurring of unknown origin, and it is as a result of such fire and the losses occasioned thereby that the litigation here involved arose. Two suits were brought, namely, a De-

claratory Judgment proceeding instituted by the appellant in the United States District Court against the appellee, Harry J. Aaron, and sundry other parties, including the 934 bailors mentioned, and the other a suit of Harry J. Aaron against Piedmont Fire Insurance Company, which was instituted in the State court and subsequently removed to the District Court upon the petition of the appellant upon the grounds of diversity of citizenship.

The Declaratory Judgment proceeding was instituted in the United States District Court on September 12, 1942, through the filing with the Clerk as of that date the petition required, the form and allegations of which, found in the record commencing at page 2, give a complete resumé of the appellant's case, to which special reference is here made, the salient features being as follows:

(a) That it had issued a binder for an Inland Marine insurance policy at the instance of Aaron, which, under its express terms, provided protection severally to numerous persons who had deposited with the applicant for safe storage, such providing no primary insurance of any character on the property of the appellee, Aaron;

(b) That from an investigation made subsequent to the fire the appellant had reached the conclusion that the binder for the contract of insurance in question had been procured by fraud, including misrepresentation and concealment on the part of the appellee, Aaron, and his broker, which allegation of fraud was definitely stated in the complaint;

(c) That from further information so acquired subsequent to the fire it was advised that it was not the sole insurance company interested or bound upon the property concerned and consequently there was no way for it to ascertain the extent of its contractual obligations to those affected by the loss except through the means of a suit such as it was then instituting;

(d) That there was reasonable apprehension of numerous suits being instituted against the appellant, including the appellee, Aaron.

III.

SPECIFICATIONS OF ERROR.

1. The Court erred in sustaining the dismissal by the District Court in the first instance from a jurisdictional standpoint (*Aetna* v. *Haworth*, 300 U. S. 227; *Maryland Casualty Co.* v. *Consumers Finance Service*, 101 Fed. (2d) 514), and in the second place in the dismissal thereof after jurisdiction had been assumed and the cause had been permitted to proceed at the expense of time and money to the litigants (*Brillhart* v. *Excess Ins. Co. of America*, 316 U. S. 491).

2. The Court erred (a) in sustaining the District Court in its holding that the appellee, Aaron, was entitled to a trial by jury as a matter of right in the Declaratory Judgment action involved in the first instance as the issues presented in such Declaratory Judgment complaint presented issues purely equitable in their nature and demanding equitable relief through the judgment of the Court;

(b) in sustaining the action of the District Court in refusing to grant the motion of the appellant that the consideration of the issues presented in Civil Action No. 16, under which a jury trial might be demanded, should be postponed until the equitable issues presented in Civil Action No. 9 should have been determined (*American Life Ins. Co.* v. *Stewart*, 300 U. S. 203-216).

3. That the Court erred in sustaining the holding of the District Court that the question as to liability of the insurer under the facts alleged in the pleadings pre-

sented a question for the jury to determine as under the facts alleged in the pleadings the policy of insurance concerned not a single individual but many individuals, each having a present right of action against the insurer for their individual loss, if sustained. Under the Declaratory Judgment proceeding the rights of each of these litigants would be protected, while the common law action instituted by the appellee was ineffectual to grant relief. Federal Rules of Civil Procedure, Rule 23. *National Hairdressers, etc.*, v. *Philad Co.*, 41 F. Supp. 701; *Carpenter* v. *Edmondson*, 92 Fed. (2d) 895-897; *Crosley Corp.* v. *Hazeltine Corp.*, 122 Fed. (2d) 925; *Pacific Fire Ins. Co.* v. *Reiner*, 45 F. Supp. 703.

4. That the Court erred in sustaining the holding of the District Court that under the facts presented in the record, and subsequently, the rights of the parties might be determined in the action of law as the Court thereby ignored the respective rights of the parties under the express terms of the policy of insurance before the Court for construction.

5. The Court erred in holding with the District Court that a recovery under the "binder" mentioned in the record under the allegations and pleadings of this case could be had at law, and the consideration of such question, did not involve a purely equity issue.

6. The Court erred in considering and accepting as a factual basis or background for its approval of the action of the District Court an *ex parte* affidavit as to facts not found in the record as certified up from the District Court, namely, that the affiant had been informed that the Judge of the District Court in reaching his decision to dismiss the Declaratory Judgment action had been influenced by certain facts alleged to have been stated at a pre-trial conference when there was no mention of a

pre-trial hearing before the Court either in the opinion or order of the Court, or record, so certified.

IV.

ARGUMENT.

It is respectfully submitted that the pleading here considered definitely states a case which on its face entitles the litigant to ask relief of the District Court under the Federal Declaratory Judgment Act, 28 U. S. C. A., Section 400 (3) (*Aetna L. Ins. Co.* v. *Haworth*, 300 U. S. 227, 81 L. Ed. 617; *Brillhart* v. *Excess Ins. Co. of America*, 316 U. S. 491-502, 86 L. Ed. 1620), and moreover the issues presented were such as to entitle a litigant to equitable relief, such relief as belongs to a court of chancery alone, such in fact as was never assumed to be appropriated by the common law court. Consequently, we contend that the District Court committed error when it refused to grant the appellant's motion to strike the pending request of the appellee, Harry J. Aaron, for a trial by jury (Record 86).

We also contend that the District Court again committed error when refusing the companion motion made on behalf of the appellant that the common law action against the Piedmont Fire Insurance Company, originally brought in the State court, should be dismissed upon the ground that the pleadings therein failed to make out a case upon which relief could be granted (Record 86).

These two motions may be and should be considered as corollaries of each other, for obviously if the Court should be of opinion that the complaint in the Declaratory Judgment cause presents issues which were solely cognizable in a court of chancery a jury trial such as contemplated under the Seventh Amendment to the Constitution would be inappropriate [*Home Insurance Co.*

v. *Virginia-Carolina Chemical Co.*, 113 Fed. 1; *Brown, et al.*, v. *Pacific Life Insurance Co.*, 62 Fed. (2d) 711 (4 C. C. A. 1933)], and for like reason the common law action instituted by the appellee, Aaron, could not be sustained as the pleading admits on its face that the plaintiff was not in possession of a complete contract of insurance with the insurer, but merely such a contract as could only be enforced in a court of equity (See Virginia Statute, Section 6094), under which action was brought [Appendix] and the following decisions selected from this Court and the Supreme Court of Appeals of Virginia cited in support.) *Taylor* v. *Merchants F. Ins. Co.*, 9 Howard 390, 13 L. Ed. 187; *Union M. Ins. Co.* v. *Commercial M. M. Ins. Co.*, 19 Howard 318, 15 L. Ed. 636; *Franklin F. Ins. Co.* v. *Colt*, 20 Wallace 560, 22 L. Ed. 423; and *Eames* v. *Home Ins. Co.*, 94 U. S. 621, 24 L. Ed. 289; and *Wooddy* v. *Old Dominion Ins. Co.*, 31 Gratt. 362; *Haskins* v. *Agricultural F. Ins. Co.*, 78 Va. 700; *Haden* v. *Farmers & M. Fire Asso.*, 80 Va. 683; *Interstate F. Ins. Co.* v. *McFall*, 114 Va. 207, and *Natl. Liberty, etc.*, v. *Jones*, 165 Va. 606.

The third motion made on behalf of the appellant, which was also refused by the District Court, was directed to an alternative suggesting the postponement of consideration of the common law action until the Court should have determined the equitable issues involved and presented in the Declaratory Judgment proceeding, this suggested motion being made under the authority of *American Life Ins. Co.* v. *Stewart*, 300 U. S. 203.

It has generally been held that if there is no pending suit between the same parties, or if it is not plainly manifest in case there is such suit that the relief which can be obtained in such is as fully adequate and complete as can be afforded in the Declaratory Judgment proceeding a trial court exceeds its discretion when declining to entertain such suit. *Maryland Casualty Co.* v. *Consumers Finance Service* (3 C. C. A.), 101 Fed. (2d) 514;

United States Fidelity & G. Co. v. *Koch* (3 C. C. A.), 102 Fed. (2d) 288; *Employers' Liability Assur. Corp.* v. *Ryan* (6 C. C. A.), 109 Fed. (2d) 690 [311 U. S. 722, 85 L. Ed. 470]; Federal Rules of Civil Procedure, Rule 57.

THE OPINION AND ORDER OF THE DISTRICT COURT.

In view of the circumstances that the Circuit Court of Appeals affirmed the action of the District Court in dismissing the Declaratory Judgment proceeding instituted by the appellant and in substituting in its place and stead the common law suit brought by the appellee, Aaron, against the appellant, the Declaration in which (Record 51) presents the sole pleading of affirmative nature upon which the cause is to be continued and tried when remanded to the District Court, and especially because the Circuit Court of Appeals in reaching its decision considered a certain affidavit and statements respecting certain alleged settlements made by the appellee, Aaron, which were stated to have affected or influenced the District Judge in dismissing the appellant's suit when the record fails to show that such matters were before the Court, we deem it necessary to briefly comment upon the opinion and judgment of the District Court.

We take from the order [R. 86] the reasons assigned for the action taken and will consider such *seriatim*:

> (a) "all rights of the parties had fully matured before either one of the actions herein were instituted".

The Court seems to have been under the impression a Declaratory Judgment proceeding could not be entertained where the rights of the parties had matured before the institution of the suits concerned. This was an early view taken by some courts before the scope and purpose of Declaratory Judgment actions had developed.

We deem it unnecessary to cite any of the numerous cases decided by the Federal Courts as to the error of this theory.

(b) "the pleadings do not present a proper case for declaratory judgment".

It is possible that the Court may have reached this conclusion upon its erroneous conception of the scope and purpose of the Declaratory Judgment Act just mentioned. However, as heretofore stated, the complaint in appellant's action would seem to state as clear and perfect a case for the granting of declaratory judgment relief as can be conceived of. (See authorities cited in accompanying petition and herein, *supra*).

(c) "that in Civil Action No. 16 (the common law action brought by Aaron) every defense disclosed by the pleadings in Civil Action No. 9 (the Declaratory Judgment suit) is fully available to Piedmont Fire Insurance Company".

It will be recalled that the common law action here referred to was a suit under the Virginia Statute, Section 6094, found in the Appendix. It was an action brought by Aaron by and for himself against the appellant. The form of the action as definitely disclosed in the Statute referred to was intended to be used *only* where the plaintiff was in *possession* of an insurance policy issued by the defendant. The Statute itself was adopted to save the pleader the necessity of following the prolix common law forms of declaration on insurance policies long prevailing in the State of Virginia and in England. Certainly the declaration as found in the record (page 50) could do no more standing alone than to present a single issue to settle a single claim between the two litigants. The District Court seems to have ignored the existence of other parties defendant to the

Declaratory Judgment proceeding though such parties were then before the Court and had joined issue in the Declaratory Judgment proceeding with the plaintiff and asked for protection by the Court. (Record 43.) And while the common law action is predicated upon a specific contract therein mentioned, namely, the Furriers' Customers Insurance Policy, a copy of which was filed with the declaration (Record 51), the order of the Court directs that when a trial is had the issues to be submitted to a jury for determination shall be whether or not an alleged *binder*, the identification of which is obtained from an exhibit filed with the Declaratory Judgment suit, and matters incorporated in such binder, "by reference" [presumably the Furriers' Customers Insurance Policy] and other facts "*constituted* a binding contract between the parties". It is submitted that the order of the Court in itself shows the necessity for a Declaratory Judgment as to the alleged contract, and consequently the action of the Court in so dismissing the Declaratory Judgment proceeding and substitution for such the form of action mentioned was an abuse of discretion on the part of the District Judge.

The action of the District Court denied to the litigant a privilege and remedy provided by Congress through the Declaratory Judgment Act, and this action of the Court now approved by the Circuit Court of Appeals of the Fourth Circuit (Record 98) is in conflict with the views of this Court, and out of harmony with the rule of construction adopted in other Judicial Circuits. See Petition B (1).

THE OPINION OF THE CIRCUIT COURT OF APPEALS (Record 98).

In considering the opinion in the Circuit Court of Appeals we follow the headnotes as carried in the advance sheets, 138 Fed. (2d), commencing at page 132, and treat the first three collectively.

The Court holds: [1] whether an insurer is liable on a *binder* procured by fraud whether arising in an action of an assured against the insurer or the latter's suit for declaratory judgment *presents a question for the jury;* [2] ordinarily that when the defense of fraud is interposed to an *action on a policy* and such action is imminent or pending, there is no occasion for equitable relief and the parties' rights will be left to be determined in the suit at law; [3] the Federal Declaratory Judgment Act expressly provides for trial by jury.

COMMENT.

Of course, no question can be raised in respect to [3]. When we consider, however, [1] and [2] we submit with great respect that there is a fallacy present due apparently to the misapprehension of the terms of the actual policy involved in the instant case. Strange to say, in neither the District Court nor the Circuit Court of Appeals, in both of which opinions were rendered (Record 83 and 98), is the *contract of insurance identified* or reviewed. The real and substantial question at issue is therefore begged. It might be conceded that if the action in the instant case had involved the usual standard fire policy, or a standard life insurance policy, such as were before this Court in the cases cited by the learned Judge, the matter at issue could not be questioned, as this Court has repeatedly held that the defense of fraud *under* an *insurance policy* could be made in the common law courts and the issue presented goes to the jury. But where there is no policy, and the very nature and terms of the contract itself is in dispute, does the rule as stated apply?

Headnote [4] of the opinion of the Circuit Court of Appeals reads as follows:

"Insurance

"Recovery at law may be had upon a contract for temporary insurance such as is evidenced by a binder."

The Court says:

"Contention is made that recovery on the binder could be had only in equity, and that under the Rules of Civil Procedure trial by jury was not mandatory for that reason. It has long been established, however, that recovery at law may be had upon the contract for temporary insurance which the binder evidences." (Citation of authorities follow.)

An analysis of the administration of insurance law and the construction placed upon an insurance contract in different jurisdictions would seem important when considering the quoted paragraph of the opinion. In many States it has been held that an action at law may be had on a contract for temporary insurance, evidenced by a "binder", but it is believed that an examination of these cases, including those cited by the Court, will definitely show that under the facts reviewed there has either been a promise in the binder for the "continuance of a former policy" where all of the terms of the contract are known and agreed upon, or otherwise the binder itself carries adequate information to show that the minds of the parties concerned have met according to the statement recited. It is believed, however, that the rule established by the court and now prevailing in Virginia both federal and state hold to the contrary. If this observation be correct it would seem that the rule adopted and followed in the instant case by both the District Court and the Circuit Court of Appeals is contrary to the rule which has been followed in this State for a century. The cases to which we refer are cited herein,

supra, page 23. These cases include the single case from Virginia found in the opinion quoted *supra*, i. e., *National Liberty Ins. Co.* v. *Jones*, 165 Va. 606, 183 S. E. 443. In the instant case no policy was issued, merely a letter from the insurer "binding" the risk pending the issuance of the policy mentioned which was to follow. Even the form of the policy which is to fix the rights of those concerned, as the beneficiaries thereunder, is not agreed upon by the litigants.

Moreover, the policy sought of the appellant in the instant case [the terms of which we believe will be accepted as fixing the rights of the parties concerned pending the issuance of the policy to follow] bears no similarity whatsoever to the class of policies involved in the cases found in the opinion, *supra*. The very difference between the two classes of policies, or contracts of insurance, dealing as they do with different persons and providing payment to those entitled thereunder in a different way, would necessarily demand a different construction of the policy itself, and a different forum for the settlement of the claims of those concerned. Certainly if it was desired to avoid 900 or more suits brought by those entitled to sue the insurer a single common law action could not grant relief. In the *Reiner Case*, *supra*, there was a common law action in the State court for less than $20.00 with possibly 5,000 parties in interest. A declaratory judgment suit as here was the result.

The Furriers' Customers Policy does not provide under its terms for the ascertainment of loss and damages occasioned as a result of fire or other injury to property insured, such as by moths, etc., through appraisal of the loss as in the ordinary standard fire policy. In fact, the policy carries no appraisal or arbitration clause at all (Record 25-31). The policy is merely a blanket policy providing for the insurer to pay, at its election, to the assured or its customers the *amount of cost to replace* or *repair* any fur garment with materials

of like kind and quality, such *cost* not to exceed the amount of the storage receipt which the bailee has issued to the bailor, it expressly provides that this loss, when ascertained, may, *at the option of the insurance company*, be paid or adjusted with the customer or bailor.

Moreover, the policy in fact, and in law, provides for primary insurance to the customers individually, not collectively, and, moreover, the policy expressly excludes by its terms liability on the part of the insurer for any property belonging to the bailee, or any subsidiary or affiliate of such. A cursory examination of the policy itself will show that it is provided and issued for the protection of numerous parties who at the time of loss occupy the relation of bailors to the applicant thereof, and that such provides for no aggregate payment. It is a several and not a joint liability, however viewed.

It would seem therefore that the observations carried in the opinion of the learned Judge of the Circuit Court of Appeals in headnotes [1-2-4] cannot be accepted as conclusive in establishing the law of the case.

Similar Policy Construed by Federal Court in Louisiana.

A similar policy involving the identical question now before this Court was before the United States District Court of Louisiana under the companion inland marine policy, being the Inland Marine Pawnbrokers Policy, which had been issued to protect the pledgors of a pawnbroker. The District Court held that the bailors who had their property in storage under the pawnbrokers' ticket were necessary parties in an action brought by the insurance company seeking a declaratory judgment, *Pacific Fire Insurance Co.* v. *Reiner* (1942), 45 F. Supp. 703. The same rule, or construction, we believe, has been generally followed by the courts where the relationship between the insurer, the insured, and the beneficiary under the policy, or contract, has been the same. We re-

fer to the following cases: *Century Ins. Co., Ltd.*, v. *First Natl. Bank of Hugh Springs, Texas* (5 C. C. A., 1939), 102 Fed. (2d) 138; *Central States Grain Co-Op.* v. *Nashville Warehouse and Elevator Corp.* (7 C. C. A., 1931), 48 Fed. (2d) 138. These cases do not conflict with those decisions arising under the ordinary policy issued to a warehouseman, such as *Boyd* v. *McKee*, 99 Va. 72; *Home Ins. Co.* v. *Baltimore Warehouse Co.*, 93 U. S. 527. *The terms of the insurance contract differs.*

National Liberty v. *Jones, supra,* recognized the rule followed in Virginia and by this Court. The case was not brought on a binder or under a policy but for damages alleged by reason of a non-delivered policy promised. In other words, on an action such as recognized in *Sanford* v. *Orient Insurance Co.*, 174 Mass. 416, 75 A. S. R. 358-360. For distinction of the two forms of action see Couch on Insurance, Volume 8, Section 1971.

The allegations in the pleading in the common law case brought under Section 6094 of the Code would estop, not facilitate, an amendment permitting the plaintiff therein to sue for breach for non-delivery of a policy. (See Appendix to Petition.) The situation is not similar to, but contrary to, the facts before this Court in *Northern Assurance Co.* v. *Grand View Building Assn.*, 203 U. S. 106.

Under the fifth and sixth headnotes of the opinion the Court proceeds to say that there was no occasion for the District Court to retain the Declaratory Judgment suit as the only remaining issue "would be tried in the same way in the action to recover on the binder as in the suit for declaratory judgment" and therefore there was no occasion to complicate the record by retaining such suit on the docket so "the order dismissing that portion of the consolidated proceeding was properly entered", i. e., the order appealed from, found in the record (page 86).

Here again the lack of interpretation of the contract

is of significant importance as well as the action of the Court in accepting and passing upon evidence or statements of fact not found in the record nor contained in the pleadings. The action of the Court in respect to these matters is among the questions presented in the accompanying petition for *certiorari*.

These and other questions presented in the petition were brought to the attention of the Circuit Court of Appeals in the petition for rehearing found in the record.

CONCLUSION.

In conclusion, it is respectfully submitted that for the reasons assigned a writ of *certiorari* may be granted that this Court may review the decision of the Circuit Court of Appeals for the Fourth Circuit and reverse the same as prayed for in this petition.

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MAR 6 1944
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 705.

PIEDMONT FIRE INSURANCE COMPANY, *Petitioner,*

v.

HARRY J. AARON, MRS. D. E. ROLES, MRS. WALTER ROOKS ET ALS.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

MEMORANDUM FOR RESPONDENT, HARRY J. AARON.

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INDEX.

	Page
Opinions below	1
Questions presented	1
Statement	2
Argument	9
Conclusion	13
Appendix	14

CITATIONS.

CASES:

Aetna Casualty & S. Co. v. *Quarles* (4th Cir.) 92 F. 2d. 321	9, 10
Maryland Casualty Co. v. *Boyle Const. Co.* (4th Cir.) 123 F. 2d. 558	9
Brillhart v. *Excess Insurance Co.*, 316 U. S. 491	9
Lord v. *Veazie*, 8 How. 250	12
South Spring Hill Gold Mining Co. v. *Amador Median Gold Mining Co.*, 145 U. S. 301	12

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MEMORANDUM FOR RESPONDENT, HARRY J. AARON.

OPINIONS BELOW.

The opinion of the District Court appears in the Record at page 83. The opinion of the Circuit Court of Appeals is in the Record at page 99. A petition to rehear was denied by the Circuit Court of Appeals (R. 104).

QUESTIONS PRESENTED.

While the petitioner specified error, in variation, the ground of the specifications is the charge that the Court of Appeals erred in sustaining the District Court's dis-

missal of the petition for declaratory judgment, holding that in the exercise of a sound discretion a proper case was not presented.

STATEMENT.

The error relied upon in seeking the writ is alleged to be that of the Circuit Court of Appeals for the Fourth Circuit affirming the District Court which had dismissed a petition for declaratory judgment filed therein by the Piedmont Fire Insurance Company. The action of the District Court was taken at a time when in that court two pending causes had been consolidated. One cause arose in a Virginia state court where the plaintiff in a common law action sued the Piedmont Fire Insurance Company upon a contract of insurance. Shortly after the institution of that suit, and before its removal, the defendant in that action filed its petition for a declaratory judgment in the federal court. After the removal of the suit from the state court the pleadings having been made up, the causes were consolidated, the court saying (R. 71), "it appearing that they involve common questions of law and fact and that consolidation will reduce cost and delay". The controversy centered in both actions upon the contract sued upon in the state court, which contract the petitioner, Piedmont Fire Insurance Company, asked the Court to declare null and void (R. 10) "and that the plaintiff, Piedmont Fire Insurance Company, is not liable under said binder either to the defendant, Harry J. Aaron, or the defendants, Mrs. D. E. Roles or others similarly situated".

The District Court had jurisdiction of the petition for declaratory judgment. There seems to be confusion in the minds of counsel for petitioner when it is said that the court having jurisdiction, petition being filed, it was encumbent upon the court to proceed in that cause. The District Court, in the exercise of its discretion, determined upon the pleadings and the factual situation that a jury trial could be had in the common law action which was removed from

the state court; that in that action all issues between the parties could be determined; and that the petitioner could present all defenses in the common law action and have the same relief therein as it might have in the petition for declaratory judgment. The lower court declined to sustain the position of the petitioner that the common law action brought over from the state court could not be heard for the reason that no policy of insurance had been delivered at the time of the fire; that the only remedy that the insured had was a suit in equity requiring the delivery of the policy; and that any suit by the insured against the company would have to be upon the policy and not upon the binder, the contract upon which the state court action was rested, and the answer of the insured to petition for declaratory judgment was based.

In the answer of Harry J. Aaron to the petition of the Piedmont Fire Insurance Company filed in the District Court, the second defense asserted was as follows (R. 33):

> This defendant says that this Court should not take jurisdiction of this cause, for the reason that there is now pending in the Circuit Court for the City of Newport News, Virginia, an action of trespass on the case *in assumpsit* under the style of "Harry J. Aaron v. Piedmont Fire Insurance Company, a foreign corporation". In that suit process issued prior to the institution of this cause * * * That in the suit pending in the state court the same issues will arise as are alleged to be the issues in the complaint filed in this cause, the simple issue in each case being as to whether or not Harry J. Aaron held a valid binder for $300,000.00 insurance on a stock of customer's furs at the time of the fire from the Piedmont Fire Insurance Company, a corporation organized under the laws of the State of North Carolina, * * *

It will be seen, therefore, notwithstanding the assertion in the petition and brief, that the District Court of its own motion did not dismiss the declaratory judgment proceeding; that at the earliest opportunity, which arose when

the defendant, Harry J. Aaron, was required to answer the petition filed in the federal court, his position was that the court should not take jurisdiction for the reasons which he assigned, which defense the District Court sustained and the Circuit Court of Appeals affirmed, and denied petition for rehearing. The petitioner now says it was surprised at the action of the court, taken as it says "on the court's own motion". At the earliest moment it was advised of the position of the defendant in this respect. The petition for declaratory judgment was filed on September 12, 1942, and the answer of the defendant, Harry J. Aaron, was filed on October 3, 1942.

This preliminary discussion brings us to the consideration of the error relied upon in the petition for the writ of certiorari in this cause. Judge Way in the District Court considered three motions and stated the motions in a written opinion in the following language (R. 83):

> That the motions (1) to strike the request of Harry J. Aaron for trial by jury, (2) to dismiss the action of said Harry J. Aaron against Piedmont Fire Insurance Company on the ground that in the state of the pleadings said Aaron has failed to make out a case upon which relief can be granted, and (3) for a declaratory judgment, should be denied.

These several motions had been argued. The first motion that the court disposed of appeared in the answer of Harry J. Aaron to the petition for declaratory judgment, the answer concluding with this paragraph (R. 37):

> And now having fully answered the complaint, this defendant says that for the reasons hereinbefore stated no decree should be entered herein other than a dismissal of this cause, that should the Court take jurisdiction of the cause and proceed to hear it, that then this defendant asks for, as he is entitled to have, a jury trial on the issues herein involved.

The granting to Aaron of a jury trial and overruling motion addressed to the common law declaration were not appealable at that stage of the litigation.

In the state of the record at the time that Judge Way rendered his decision, matters before the court for decision stated as above were open and the court in each instance denied the motion, holding that a proper case for declaratory judgment was not presented. (R. 83)

> It is the view of the Court that the pleadings do not present a proper case for a declaratory judgment. All rights that the insured can ever have under the binder matured as a result of the fire before Civil Action No. 9 was instituted. Civil Action No. 16 was, in fact, instituted in the state court before Civil No. 9 was instituted here. Every defense disclosed by the pleadings in No. 9 is fully available to the insurer in No. 16, and, in fact, No. 9 raises no issue that is not presented in No. 16.

Further, the court declared:

> In the trial of the case before the jury the insured will have, as in any other similar case, the burden of establishing a valid, binding contract between him and the insurer existing at the time the fire occurred * * * That issue of fact, as I view the matter, is comparatively simple and, as already stated, all rights of both parties had fully matured before any action was instituted by either party.
>
> In the event it is determined that the binder issued on June 15, 1942, together with the extrinsic evidence incorporated therein by reference, constituted a binding contract between the Insurance Company and the insured, the issue or issues of fact concerning authority, alleged fraudulent misrepresentations and concealment by the insured can be presented to the jury for decision upon appropriate instructions in the same manner that such issues of fact are usually and normally presented in a suit upon an insurance contract.

The court went on to say that if the recoverable loss could not be agreed upon, assuming that under the instructions of the court the jury found a valid and subsisting contract for insurance, that then the court would refer the question of damages to a master pursuant to Rule 53, further saying:

> By so doing, a long, tedious jury trial and the danger of the jury becoming confused upon the issues respecting liability, can thereby be avoided. In that connection, I understand that approximately nine hundred pieces of fur are alleged to have been destroyed or damaged in the fire in question. Such a reference to a competent master will also afford the parties increased opportunity to stipulate with respect to many of the items of damage.

The foregoing quotations are from the opinion of the court, the order entered held (R. 86):

> for reasons stated in writing and filed with the papers in these causes on the 28th day of April, 1943, that all rights of the parties had fully matured before either one of the actions herein were instituted; that the pleadings do not present a proper case for declaratory judgment, and that in Civil Action No. 16 every defense disclosed by the pleadings in Civil Action No. 9 is fully available to Piedmont Fire Insurance Company; * * *

dismissed the complaint for declaratory judgment, placed the case on the trial calendar and stated that the issue would be submitted to a jury as to whether or not the alleged binder and the matters incorporated therein by reference, and any other facts, constituted a valid, binding contract between the parties, and whether or not there is liability upon the defendant for the alleged losses resulting from said fire. It was further ordered:

> That the issue as to the amount of damages, recoverable loss, to Aaron, if it be found that he had a valid and subsisting contract at the time of the fire, will be referred to a master to make report thereon pursuant to the provisions of Rule 53 of the Federal Rules of Civil Procedure.

Counsel for respondent is at a loss to understand the statement made in the petition for rehearing filed in the Circuit Court of Appeals appearing at the top of page 2, there it is stated:

> The Piedmont has never denied liability in this case, but to the contrary, it has asked the Court to pass upon its obligations, if any, to those who claimed rights under its Furrier's Customers' Policy, * * *

And in the same petition which appears to have been made a part of the Record in this cause by being bound with the Transcript of Record, it is said at page 23:

> It has been asserted both in the pleadings and through briefs that the Piedmont Fire Insurance Company had denied liability under the terms of the alleged contract. It is submitted that the Record gives no substantiation as to the correctness of this allegation.

Evidently, from these references, counsel for petitioner seeks to impress this court with the thought that they are in an interpleader position, not denying liability on the binder contract, but not knowing to whom the funds should be paid. We quote from page 10 of the Record the second prayer of the plaintiff as follows:

> (2) That, specifically, this Court decree and declare that said binder so issued on June 15, 1942, in the name of the plaintiff, Piedmont Fire Insurance Company, by its agent, Y. K. Gayle, at Newport News, Virginia, at the instance and request of the defendant, Harry J. Aaron, be declared null and void, and that the plaintiff, Piedmont Fire Insurance Company, is not liable under said binder * * *

In what more definite language could a denial of liability be expressed than in that which we have quoted. We would again refer to page 3 of the petition filed in this court for the writ and say that the question presented to the court is not in accordance with the factual situation as disclosed by the pleading. From the outset, the defendant, Harry J. Aaron, contended and so answered, not that the court did not have jurisdiction to entertain the petition, but in the exercise of a sound discretion it should not determine and hold that a proper case for a declaratory judgment was presented.

It would appear, therefore, that the only question here is whether there was an abuse of discretion in the District Court in dismissing the suit for declaratory judgment. Not on its own motion, though the court at any time could look into the pleadings in a case and determine whether it was a proper case for the entry of the declaratory judgment. The appellate court affirmed the District Court.

The Court of Appeals in its opinion said (R. 99):

> It is clear, we think, that the order appealed from should be affirmed. The question as to whether the insurance company was liable on the binder was one for trial by jury whether arising in the action on the binder or in the suit for declaratory judgment. "Ordinarily, when the defense of fraud may be interposed to an action at law on the policy and such action is imminent or pending, there is no occasion for equitable relief and the parties will be left to their rights as determined in the suit at law."

The court further held that the contention made that recovery on the binder could only be had in equity was not sound, saying:

> It has long been established, however, that recovery at law may be had upon the contract for temporary insurance which the binder evidences.

And then concluding:

> Since there was no occasion to retain the declaratory judgment suit for the determination of the rights of those who had stored furs with Aaron or the liability of the other insurance companies, and since the only issue remaining in the case would necessarily be tried in the same way in the action to recover on the binder as in the suit for declaratory judgment, there was no occasion to complicate the record of the procedure by retaining that suit, and the order dismissing that portion of the consolidated proceeding was properly entered. * * * The granting of declaratory relief, however, is a matter resting in the sound discretion of the court; and the discretion is properly exercised by dis-

missing the suit when it is apparent that it will serve no useful purpose.

We have the District Court and the Court of Appeals on the record which is here presented, concluding that the exercise of sound discretion required the court to dismiss the petition for declaratory judgment, as it would serve no useful purpose. Upon petition for rehearing the appellate court adhered to its former decision and denied the petition.

ARGUMENT.

In sustaining the ruling of the District Court in dismissing the declaratory judgment proceeding, it was said:

> The granting of declaratory relief, however, is a matter resting in the sound discretion of the court; and the discretion is properly exercised by dismissing the suit when it is apparent that it will serve no useful purpose.

This was the concluding paragraph of the opinion in the Court of Appeals, citing *Aetna Casualty & S. Co.* v. *Quarles*, (4 Cir.) 92 F. 2d. 321; *Maryland Casualty Co.* v. *Boyle Const. Co.*, (4 Cir.) 123 F. 2d. 558; *Brillhart* v. *Excess Ins. Co.*, 316 U. S. 491, 494. In *Brillhart* v. *Excess Ins. Co.*, *supra*, Mr. Justice Frankfurter said:

> Although the District Court had jurisdiction of the suit under the Federal Declaratory Judgments Act, it was under no compulsion to exercise that jurisdiction. The petitioners motion to dismiss the bill was addressed to the sound discretion of the court. * * * Ordinarily, it would be uneconomical as well as vexatious for a federal court to proceed in a declaratory judgment where another suit is pending in a state court presenting the same issues, not governed by federal law, between the same parties.

In the light of this pronouncement it must be concluded that if two causes, between the same parties, are in the same federal court, the court may in its discretion refuse

to exercise its jurisdiction and grant a declaratory judgment.

In the opinion of the Brillhart case it is noted that *Aetna Casualty & S. Co.* v. *Quarles*, C. C. A. 4 Cir. 92 F. 2d. 321, is cited with approval. The court further said:

> We do not now attempt a comprehensive enumeration of what in other cases may be revealed as relevant factors governing the exercise of a district court's discretion. It is enough that it appears from the record before us that the District Court did not consider whether, under applicable local law, the claims sought to be adjudicated by the respondent in this suit for a declaratory judgment had either been foreclosed by Missouri law or could adequately be tested in the garnishment proceeding pending in the Missouri state court. This was a matter for determination, certainly in the first instance by the District Court. Nor did the Circuit Court of Appeals, in reversing the judgment of the District Court, purport to find that under controlling Missouri law the issues set up by the respondent in this suit could not be contested in the pending Missouri proceeding.

No just criticism can be made of the finding of the District Court which was affirmed by the Circuit Court of Appeals that the issue in the two cases in that court was identical and that there was no occasion for a declaratory judgment as the plaintiff in the bill was afforded all the relief in the trial of the state court action removed to the federal court that it might have had in a declaratory judgment proceeding.

Mr. Justice Douglas in a concurring opinion in the Brillhart case said:

> The exercise of jurisdiction under the Federal Declaratory Judgment Act is certainly not compulsory; it is discretionary. Borchard Declaratory Judgments, 2d Ed. 312.

The factual background in the instant case is in marked contrast with that of the Brillhart case. Here it abun-

dantly appears from the record of the trial court that the District Court did carefully consider the claims sought to be adjudicated by the petitioner in its suit for a declaratory judgment, and that said claims could adequately be tested in the common law action and so found.

The dissenting opinion of Mr. Chief Justice Stone, concurred in by Mr. Justice Roberts and Mr. Justice Jackson, is not in conflict with the majority opinion so far as the instant case is concerned. Applying both the prevailing opinion and dissent to the situation which arose when the two cases were consolidated, and all of the facts as disclosed by the pleadings were before the District Court, the Court had full opportunity to examine the same, which it availed itself of, and found in the exercise of a sound discretion, that no case was presented for a declaratory judgment.

It is contended in the petition for the writ, in this cause, that the Circuit Court of Appeals adopted as a basis for its ruling facts which were presented to the Circuit Court of Appeals by affidavit of the respondent, and that this constituted error. The record in the case does not contain the affidavit. We append it to this brief. The Court of Appeals said that an affidavit had been filed with that court, the averments of which "are not controverted by the insurance company". (R. 99)

This affidavit showed that of 976 customers who held storage receipts all except ten had settled their claims with Aaron under the storage certificates, exhibited at page 22 of this record. The Court further said in its opinion:

> It was stated, without contradiction, that the situation at the time of the pretrial conference preceding the entry of the order of dismissal was not substantially different.

This matter developed in the Circuit Court of Appeals and became a matter of proper inquiry. If it were true that the only claimant under the insurance policy was Aaron, the

court was entitled to know that and if at the time of the dismissal of the declaratory judgment proceeding the same situation substantially obtained and had controlling influence in the dismissal of the declaratory judgment proceeding by the District Court, in determining whether the District Court had exercised a sound discretion, this was a fact, in relation to the litigation, of which the Circuit Court of Appeals of its own right, and on its own motion, might inquire.

In *Lord* v. *Veazie*, 8 Howard 250, 12 L. Ed. 1067, it was held that it is not contempt of court to bring to the attention of the court the status of a case under consideration if there remained little or no controversy, and that a suit may be shown to be fictitious either by an inspection of the record or by evidence *aliunde*, or by both.

In *South Spring Hill Gold Mining Company* v. *Amador Median Gold Mining Company*, 145 U. S. 301, 36 L. Ed. 713, it was brought to the attention of the court that since the decision in the Circuit Court, the control of both corporations, parties to the suit, had come into the hands of the same persons. The court said:

> We cannot, however, consent to determine a controversy in which the plaintiff in error has become the *dominus litis* on both sides. We assume that it is not an agreed case gotten up by collusion, but the litigation has ceased to be between adverse parties, and the case therefore falls within the rule applied where the controversy is not a real one.

The affidavit was filed to inform the court of matters which were before the district judge at the time of the dismissal of the petition and to show that the real litigation and only parties remaining in interest were the insurance company and the insured, Harry J. Aaron, with the exception noted in the affidavit. By reason of Aaron's contracts he was forced either to stand suit upon the contracts or to settle with his customers. This he had accomplished. His claim was to be asserted against the insurance com-

pany by virtue of his insurance contract. The District Court held that the matter was quite simple and that the cause should not be complicated by a piece-meal disposition and that the rights of all parties would be fully protected in a trial of the common law action which on the motion of the insurance company had been removed from the state court to the Federal Court.

At page nine of the petition for the writ it is asserted that the decision of the Circuit Court of Appeals in the instant case is in conflict with decisions of other Circuit Courts of Appeals, and cites a number of cases which it claims sustains this position. We have examined these cases. If there be conflict with the decision of the Fourth Circuit in this case, they are likewise in conflict with the decision in the Brillhart case, the principle of which the lower court followed.

CONCLUSION.

We submit that under the Declaratory Judgments Act (June 14, 1934, C. 512, 48 Stat. 955) refusal to exercise its jurisdiction by the District Court in granting a declaratory judgment was a proper exercise of its discretion, and, indeed, that in all of the circumstances the granting of such relief would have been an abuse of discretion.

Respectfully submitted.

ALLAN D. JONES,
Newport News, Virginia.

TAZEWELL TAYLOR,
Norfolk, Virginia,
Counsel for Harry J. Aaron, Respondent.

APPENDIX.

United States Circuit Court of Appeals, Fourth Circuit.

No. 5108.

PIEDMONT FIRE INSURANCE COMPANY, *Appellant*,

v.

HARRY J. AARON, ET ALS., *Appellees*.

Affidavit of Harry J. Aaron, Appellee.

STATE OF VIRGINIA,
City of Newport News, to-wit:

This day personally appeared before me, Corinne Siceloff, a Notary Public in and for the City of Newport News, State of Virginia, Harry J. Aaron, who being first duly sworn, doth depose and say:

1. That he is the principal appellee in the case of *Piedmont Fire Insurance Company* v. *Harry J. Aaron, et als.*, No. 5108, on appeal from the District Court of the United States for the Eastern District of Virginia, at Newport News, pending in the United States Circuit Court of Appeals for the Fourth Circuit.

2. That while it is alleged in the complaint of the appellant (Appendix, p. 7) that at the time of the fire storage receipts had issued to 934 persons, there had actually been issued 976 such receipts; each receipt setting forth the value of the garment, which value fixed the maximum liability of this appellee in the event of loss or damage while stored.

3. That he is informed and believes that at the time of the pre-trial conference in this case, among other representations of facts made to the Judge of the District Court for the Eastern District of Virginia, it was stated that

more than 900 of the possible claimants had had their claims adjusted and paid by this appellee.

4. This affiant further says that all of the thirty-four named holders of receipts set forth in the petition of the appellant have had their losses satisfactorily adjusted and settled by and with this appellee; that of the total of 976 holders of receipts, all have been settled with the exception of one who is interned in Japan, one who has not accepted settlement, and eight whose claims have been settled by insurance companies carrying individual policies on said furs. These companies holding the eight claims by subrogation have agreed to await the outcome of this suit and are not insisting upon adjustment of their claims at this time.

5. This affiant further says that the sum total of the values declared on the storage receipts in the ten unsettled claims is $1,500.00 so that the maximum outstanding liability that he may have to the parties holding such receipts is $1,500.00.

6. This appellee hereby offers, upon order of the Court, to deposit $1,500.00 in the registry of the Court to the credit of this cause for the settlement of the outstanding claims, or upon order of the Court, offers to deposit bond in that sum with approved surety, to assure the proper settlement of the outstanding claims.

And further this affiant saith not.

(s) HARRY J. AARON.

Subscribed and sworn to before me in the City of Newport News, Virginia, this 21st day of September, 1943.

(s) CORINNE SICELOFF,
Notary Public.

My commission expires February 14, 1945.